Michigan Manufacturers Association

MMA Testimony on HB 5002 (H-2)
Senate Reforms, Restructuring and Reinventing Committee
November 22, 2011

Thank you Mr. Chair and members of the Committee. My name is Delaney Newberry and I am Director of Human Resource Policy for the Michigan Manufacturers Association.

MMA represents about 2,500 members that operate in the full spectrum of manufacturing industries, ranging from small manufacturers to some of the world's largest corporations. Manufacturing continues to be the largest sector of our economy, directly employing over 500,000 Michigan residents.

I think you were provided with a long list of employers that support this legislation and on behalf of the thousands of Michigan job providers included on that list, we urge you to **support House Bill 5002**. The changes to the workers compensation system included in HB 5002 are a crucial step toward making Michigan's business environment more competitive.

As you know, the discussion surrounding this legislation has been pretty impassioned and there has been quite a bit of misunderstanding and misinformation so I think it would be helpful if we just back up a few steps and go over the basics of the workers comp process and some of the checks and balances that are built into the system.

Michigan's workers comp system is a no-fault system. A person's right to recovery of benefits under the Act is their exclusive remedy for work-related injuries and diseases. Individuals are entitled to 3 basic types of benefits under the workers comp act:

1. Medical Care: An injured worker is entitled to reasonable and necessary medical care. During the first 10 days of treatment, the employer has the right to choose the physician and after that the employee is free to change doctors but must notify the employer of the change and must furnish a report of that physician to the employer. If the employer or carrier shows good cause why the employee should not be allowed to continue treatment with a physician, they can petition the Agency who may order discontinuation of the treatment.

2. Wage Loss Benefits: Wage loss benefits may be claimed as long as disability and wage loss continue and are calculated at 80% of the person's after-tax average weekly wage, subject to a maximum of about $750 a week. The average weekly wage is based on the highest 39 of the last 52 weeks before the injury. In the event that the worker returns to work at a job that pays less than they were earning at the time of injury because they are unable to perform the previous job duties, they are entitled to partial benefits. If you lose specific body member, you are entitled to a specific amount for a prescribed number of weeks but you may be entitled to further disability above and beyond the specific loss amounts. The law requires prompt payment of benefits. The first payment is due 14 days after notice or knowledge of disability or death and all compensation accrued is paid weekly. The law establishes penalties of up to $50 per day with a maximum of $1500 if benefits are not paid within 30 days of when they are due. For individuals who are receiving social security benefits, pension or retirement benefits, or benefits under a wage continuation plan, self-insurance plan or disability insurance policy, there is an offset or coordination of benefits.

3. Vocational Rehabilitation: A worker has the right to vocational rehabilitation benefits. Vocational rehab services are individually tailored to meet the person's specific needs and can include a variety of support and guidance services. I believe that there is a vocational rehabilitation expert here today that can go a little further into the details of how this works but it could be as simple as making a minor change in a job so that the person can return to work within their medical restrictions or it could be working together with the employer and the employee to facilitate a return to work performing the same or different job within their skills and abilities. If it is not possible for them to return to gainful employment with their current skills, the rehab counselor can help them obtain further education and training.

Employees have several responsibilities. They must report any wages earned during the benefit period. They must submit to reasonable medical exams if required by the employer or carrier. They must cooperate with reasonable rehab efforts and they must accept a valid offer of employment from the previous employer or another employer if it is within their physical restrictions.
So let's walk through the average ordinary case.

- The worker injures him or herself – let's say he falls down the steps and sprains his ankle.
- He immediately reports the injury to his supervisor.
- The worker gets medical care. How this is delivered depends on how the workplace is set up – some worksites have company first aid stations with medical professionals on-site, but most will refer the worker to a physician or medical facility. If the nature of the injury is emergent they get the person to the nearest hospital. At this point it's the doctor that takes responsibility for the medical care of the worker. I think that's an important point to remember because there are some that would have you believe that somehow employers are responsible to direct medical decisions but once the employer hands the worker off to the doctor, it's the medical professional that is responsible for the injured worker's medical care. The physician is required to provide adequate care and is bound by the requirements of state law and professional codes of ethics.
- If it appears that the injury is significant enough that it will cause a disability that will last more than a week, the employer files Form 100, the Basic Report of Injury with the Agency
- If the employer is insured, they inform their carrier. If the company is self-insured, they will either handle it in-house or through a third-party-administrator.
- When the worker is off for a week, the company begins to pay disability benefits and they report to the Agency that they've begun to pay benefits.
- If the disability lasts for an extended period of time, the employer may request a medical exam.
- The employer may offer or the worker may request vocational rehab services.
- When the worker recovers sufficiently, he or she returns to work. Sometimes the worker is given some medical restrictions when they first go back.
- When the worker returns to full wages, benefits stop and the employer files a form with the Agency and we're done.

So this is how things work most of the time – as you've heard from folks on both sides of this issue, more than 90% of the time, workers comp cases are handled without dispute. When there is no dispute the Workers Comp Agency doesn't get involved. The employer simply fulfills his or her obligations – makes the requisite payments and files the reports with the Agency to notify them of what's going on.

But if things were always this simple we probably wouldn't be sitting here so let's talk about what happens when there is a dispute. First of all, it is not always necessary to get attorneys involved – the Agency has many services available to help both sides. Some minor disputes can be resolved through mediation – this allows parties to get together in an informal conference and resolve their issues without formal litigation.

But there are some cases that will require formal litigation. This is initiated when an employee files an Application for Mediation or Hearing with the Agency and they include with this form, information about the injury and relevant medical records. The Agency serves this on the employer and its insurance carrier and the employer must then file a response detailing information and medical records from its point of view.

At the pre-trial hearing, each party's attorneys meet with the magistrate who will try the case. They go over the papers that have been filed, they dot the "I"s they cross the "T"s and they schedule a trial date.

Workers comp trials are heard by workers comp magistrates and all of the usual rules of evidence apply. In most cases the injured worker is the primary witness involved. They may also call fellow employees or supervisors as witnesses. Most cases involve medical questions and accordingly most trials involve testimony by doctors and often the worker will have been evaluated by his own doctor and by an independent doctor chosen by the insurance carrier. Sometimes testimony is provided by private investigators to establish activity that the employee has conducted during the period of disability.

At the end of the trial, the magistrate takes the case under advisement and writes a formal opinion which is issued to the Agency, the attorneys, the worker and the employer.

If the parties disagree with the magistrate's decision, they can file an appeal with the Michigan Compensation Appellate Commission. If the worker wins the case before the magistrate but the employer appeals the decision, the worker is still entitled to 70% of the benefits ordered while on appeal and the law requires the employer to provide medical care while the appeal is pending. If the worker ultimately wins the case, they get the remainder of their wage loss benefits. If the case if overturned, the employer is reimbursed by the state from the Second Injury Fund but the worker is not required to repay any medical or wage loss benefits received from a magistrate's decision that wage eventually is overturned.

The Act does contain two special provisions for police officers and fire fighters. Section 405 provides a rebuttable presumption that respiratory or heart disease is caused by the employment if the disease first manifests itself while the individual is in active service. In virtually every other area of workers comp, the burden of proof falls on the worker to prove that work cased the disability. But in the case of respiratory and heart disease for police and fire, it is assumed that work caused the disability.

The second provision is in Section 161 and says that if an employer provides "like benefits" to police officers and fire fighters, an injured worker must elect to receive either those benefits or workers compensation benefits. So if your department offers a duty disability pension and you get injured you have to choose that OR worker comp – you can't get both. I understand that there has been a letter circulating around the Senate from a police officer who was injured in the line of duty. Now I don't know any of the particulars about the officer's case but a basic internet search shows that he applied for and was granted a duty disability retirement in August of this year. Now the exact impact of disability retirement depends on the terms of the union contract of the rules of the governmental entity but it appears that the reduction that the officer experienced in his benefits was either due to a coordination with his retirement benefits OR perhaps that he opted for the "like benefits" under the special police and fire provision instead of workers comp – but in any case it does not appear that his benefits were

reduced for any theoretical job. Quite frankly, if his attorney hasn't advised him of this, I find that reprehensible.

I'd like to respond to a few of the things that you've heard in testimony 2 weeks ago. There has been a lot of rhetoric surrounding this issue, largely by personal injury attorneys who see the legislation as a threat to their pocketbooks. There has been a lot of fear mongering and half-truths put out there and I'd like to take a few moments to get the facts straight.

First, you have heard statements that HB 5002 will somehow result in an arbitrary reduction in an injured worker's weekly benefits for a person's "theoretical" ability to work. Here are the facts:

Further clarifying language was added to HB 5002 H-2 to eliminate any concern for an arbitrary reduction by clarifying the definition of "wage earning capacity." The bill makes clear that for the purposes of determining wage earning capacity, only jobs that are reasonably available to that employee are to be considered. A person who is still recovering in the hospital has no job reasonably available to him. A person who is totally and permanently disabled would have no job reasonably available to him. No magistrate would say otherwise and if they did it would be reversed. The employer or carrier continues to pay benefits until a medical expert, either the treating doctor or an independent medical expert finds that the employee has healed to the point that they can either return to work with or without restrictions. The carrier continues to pay benefits while arranging for a wage earning capacity evaluation and as I said – there is an expert here to speak more to that process. If the voc expert does a search and determines that jobs exist within the employee's restrictions but they are not reasonably available, benefits continue to be paid.

So you see this is something that has clearly been addressed and is not a concern. The opposition is inaccurately portraying things in an effort to instill fear against a bill that will actually create stability and reduce litigation.

Second, you have heard that the provision giving employers a bigger window of exclusive medical control over claims could be detrimental to employers. This is absolutely false. First of all you should note that the bill as introduced included a 90-day time frame and the 45-day period before you is a result of compromise between the various stakeholders. It's a benefit to the employer because it gives an increased window to get the employee into evidence-based care with the goal of returning the employee to work as soon as possible. It's a benefit to the employee because s/he will have access to evidence-based medicine that relies on the best treatment options for the injury. And you have to remember that this is an optional right for employers –this isn't like a mandatory lockout period of time. There are many employers out there that don't exercise this right and often work amicably with workers who feel very strongly about seeing their own physicians. Looking back to the history of Michigan, in 1965 the statute provided that the employer had exclusive control over the employee's medical treatment for 60 days; it was reduced in 1979 to the present 10 days. So, the 45 days in the current bill is less than it had been in 1965!

Third, you've heard statements that provisions within HB 5002 are unfair because an employee who is terminated for fault could lose their benefits. This terminology comes from the parallel provision in Chapter 4 – current law that already exists - that also uses the word "fault" to address the exact same situation when it arises in an occupational disease case. What this does is address a loophole in current law where a person can use a workers' comp claim as an escape hatch for proper disciplinary action. The situations being addressed by this provision are those where an employee: is injured; returns to an accommodated job offered by the employer; and then within the first 100 weeks gets fired as a result of their own fault, e.g., deliberately coming in late, punching the supervisor, harassing coworkers etc. These aren't "stories" as one Senator suggested; these are actual cases that have been brought in Michigan. Right now, if that happens, the employee gets a reinstatement of benefits because the statute in "injury" cases says if they lose their job "for whatever reason" they get a reinstatement of

benefits. There is no reason that "injury" cases should be treated differently in this regard from occupational diseases and we need to close this loophole.

Lastly, I'd like to remind the Committee that HB 5002 does not reduce or change benefit levels in any way. The 80% calculation and the state average weekly wage maximum is not touched by this legislation.

In closing, I'd like to point out that the passage of this legislation is vital to Michigan's business climate. You've heard that there may be some question over whether workers comp costs are going up or down but I can tell you this: the real cost of workers' comp is paid by consumers in increased prices because workers comp costs are figured into every company's pricing schedule and by workers in lost job opportunities. It is a fact that Michigan business owners pay 82% more for their workers comp than businesses in neighboring Indiana. I can tell you with certainty that we do hear from workers comp plan administrators like Pat Harrington from the Michigan Retail Hardware Association who you'll hear from today that are struggling to purchase reinsurance contracts for their plan because reinsurers perceive Michigan's law as instable. I can also tell you that when company risk managers look to Michigan and see this instability and see these outrageous awards like when individuals get over 4 years of compensation when they were only actually off work for 7 months, it colors their view of our state and impacts their decisions for investment and job creation.

If we do not make these changes, the law will continue to swing back and forth based upon judicial elections and the composition of the Supreme Court. We contend that that the only real stakeholders in a workers' compensation claim are the employers and the employees and that's precisely who will benefit from the passage of HB 5002. Allowing the law the flip flop back and forth only serves the interest of the lawyers. And with that, I'm happy to take any questions and I appreciate the opportunity to speak with you today.